IN THE

Supreme Court of The United States

October Term, ~~1950~~ 1951

NO. ~~1~~

GEORGIA RAILROAD & BANKING CO.,
Appellant,

VS.

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

MOTION TO TERMINATE THE CONTINUANCE AND DECIDE THE APPEAL

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IN THE

Supreme Court of The United States

October Term, 1950

NO. 4

GEORGIA RAILROAD & BANKING CO.,
Appellant,

VS.

CHARLES D. REDWINE, State Revenue Commissioner,
Appellee

MOTION TO TERMINATE THE CONTINUANCE AND DECIDE THE APPEAL

Appellant, Georgia Railroad & Banking Company, moves the Court to terminate the continuance of the cause under the order entered February 20, 1950, to-wit:

> "Per Curiam: Inasmuch as the Attorney General of Georgia stated at the bar of this Court that plain, speedy and efficient state remedies were available to appellant, the cause is ordered continued for such period as will enable appellant with all convenient speed to assert such remedies"

and to hear and decide the case.

SUMMARY GROUNDS OF MOTION

1. *Appellee has filed plea of res judicata in State Court based on judgment of District Court on which this Court is withholding decision on appeal.*

In obedience to the above order, appellant filed appeal to the

State Court, although believing that such appeal will be dismissed by the State Court on its own motion for want of jurisdiction. Appellee has now filed in the State Court a plea, setting out the judgment of the District Court below, and alleging that it decides a controlling issue against appellant. There is substantial authority in support of the contention of appellee that the judgment of the District Court is res judicata although on appeal to this Court. *Refior* v. *Lansing Rock Forge Co.*, 134 F. (2d) 894; *Cohen v. Superior Oil Corporation*, 90 F. (2d) 810; *Straus* v. *American Publishers Assn.*, 201 F. 306; see also *Deposit Bank* v. *Frankfort*, 191 U. S. 499; *U. S.* v. *Munsingwear, Inc.*, No. 23, October Term, 1950, decided by this Court November 13, 1950.

The order of this Court therefore puts appellee in position to contend that the judgment of the District Court requires the State Court to decide the controlling issue against appellant, although this Court is withholding decision on appeal in order that the State Court may decide that very issue. The disastrous result that may result to appellant is illustrated by *U. S.* v. *Munsingwear, Inc.*, No. 23, this term, decided by this Court November 13, 1950.

The usual remedy of appellant to prevent such result is to move to continue the action in the State Court until this Court decides the appeal from the judgment of the District Court. *Willard* v. *Ostrander*, 51 Kan. 481, 32 P. 1092; *Cohen* v. *Superior Oil Corp.*, 90 F. (2d) 810; *Robinson* v. *El Centro Grain Co.*, 133 Cal. App. 561, 24 P. (2d) 554; 50 C. J. S. 623.

The application of such remedy, however, while the above order of February 20, 1950, remains in force, would lead to the stalemate of the State Court continuing the case until the appeal is determined in this Court, and this Court continuing appeal until the case is decided in the State Court.

2. *Federal Court should decide validity and effect of judgment of Federal Court, affirmed by this Court, and enforce such judgment, and not remit appellant to State Court for that purpose.*

The decision of the District Court, on which this Court is withholding decision on appeal, and which appellee is now pleading as res judicata in the State Court, was that the prior final judgment of the District Court, affirmed by this Court, permanently enjoining the collection of the taxes in question, is not binding on appellee. This presents a question of federal law which must ultimately be decided by this Court. *Deposit Bank* v. *Frankfort*, 191 U. S. 499. It should be decided in advance of consideration of the case as an original proposition, and if decided in favor of appellant, will finally conclude the entire case and render unnecessary consideration of any other issue. *Gunter* v. *Atlantic Coast Line Railroad*, 200 U. S. 273; *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

This Court should not remit appellant to the State Court to decide the validity and effect of a judgment of the Federal Court affirmed by this Court. Most particularly this should not be done where such course permits the appellee to plead in the State Court that the judgment of the District Court, on which this Court is withholding decision on appeal, is conclusive on this issue and requires the State Court to decide this controlling issue adversely to appellant.

The Federal Court should decide the validity and effect of and enforce its own judgment. *Gunter* v. *Atlantic Coast Line Railroad*, 200 U. S. 273. Indeed, it has been said that the Court which rendered judgment is the only Court that can enforce it. *Railroad Co.* v. *Chamberlain*, 6 Wall. 748.

It is the declared policy of Congress that the Federal Court enforce its own judgment, and not remit the parties to the State Court, even to the extent of enjoining any action in the State Court. *Title 28, U. S. Code.*, Sec. 2283, and the statement of the revisers thereunder.

3. *There are no unsettled questions of State law necessary to, or which might avoid the decision of the Federal issues.*

Even though the prior judgment be decided not to be controlling on appellee, there is no unsettled question of state law, the decision of which is necessary to, or which might avoid

the decision on the federal constitutional issues. The validity and construction of the contract of exemption has already been determined by the Supreme Court of Georgia in *State of Georgia* v. *Georgia Railroad & Banking Co.*, 54 Ga. 423, and by this Court in *Wright* v. *Georgia Railroad & Banking Co.*, 216 U. S. 420, and *Wright* v. *Louisville & Nashville Railroad Co.*, 236 U. S. 687. In such case this Court has held that the litigant will not be remitted to the State Court. *Public Utilities Commission* v. *Gas Co.*, 317 U. S. 456, 463.

4. *Appellant should not be remitted to the State Courts where, as here, there is no plain remedy in the State Court.*

Even where there are unsettled questions of state law which might control the case and render unnecessary decision of the federal constitutional qustions, this Court has held that the plaintiff should not be remitted to the State Court where "it is not clear that today [appellant] has open any adequate remedy in the [State] Courts." *Hillsborough* v. *Cromwell*, 326 U. S. 620, 628.

This is in accord with the settled policy of Congress, as declared in the *Johnson Act*, that a suitor not be denied relief in the Federal Court unless the remedy in the State Court is "plain". *Title 28 U. S. Code*, Sec. 1341; *Hillsborough* v. *Cromwell*, 326 U. S. 620; *Atlantic Coast Line Railroad* v. *Daughton*, 262 U. S. 413.

In this case appellant does not in fact have any remedy whatever in the State Court, and the appeal to the State Court will in all probability be dismissed by the State Court on its own motion for want of jurisdiction. The state statute expressly states in the plainest language that the remedy by appeal is not available to a railroad company required to make returns for ad valorem tax to the State Revenue Commissioner (Appellant's Brief p. 37, App. XXXII-XXXIII; Reply Brief p. 6). And, in view of the plea of res judicata filed by appellee, it now appears that the State Court may not be able to consider or decide a controlling issue in the case.

Certainly the remedy cannot be said to be "plain" under such

circumstance. *Hillsborough* v. *Cromwell*, 326 U. S. 620; *Atlantic Coast Line* v. *Daughton*, 262 U. S 413.

This Court has never before, as far as appellant can discover, denied a suitor relief in the Federal Court on the mere assertion of the opposite party that there was a plain remedy in the State Court without even considering whether there was in fact any such remedy. In every previous case before this Court, this Court has carefully considered and determined that there was a plain and adequate remedy in the State, before denying relief in the Federal Court. *Railroad Comm'n.* v. *Pullman Co.*, 312 U. S. 496, 501, *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 173; *Great Lakes Co.* v. *Huffman*, 319 U. S. 293, 296; *A. F. of L.* v. *Watson*, 327 U. S. 582, 599. And where it was not "plain" beyond question that plaintiff had an adequate remedy in the State Court, this Court has decided the case. *Hillsborough* v. *Cromwell*, 326 U. S. 620; *Corporation Comm'n* v. *Cary*, 296 U. S. 452; *Fox* v. *Standard Oil Co.*, 294 U. C. 87, 94; *Atlantic Coast Line* v. *Daughton*, 262 U. S. 413; *Wallace* v. *Hines*, 253 U. S. 66; *Union Pac. Railroad Co.* v. *Weld County*, 247 U. S. 282; *Driscoll* v. *Edison Co.*, 307 U. S. 104; *Mountain States Co.* v. *Comm.*, 299 U. S. 167; *Graves* v. *Texas Co.*, 298 U. S. 393; *Hopkins v. Southern Cal. Tel. Co.*, 275 U. S. 393.

The fact that the Attorney General stated that there was a remedy does not establish that fact. As Mr. Justice Frankfurter has observed, "After all, advocates, including advocates for States, are like managers of pugilistic and election contestants in that they have a propensity for claiming everything." *Dissenting Opinion, First Iowa Coop.* v. *Power Commission*, 328 U. S. 152, 187.

5. *Appellant in fact first sought unsuccessfully to obtain a remedy in the State Court.*

Appellant in fact attempted to secure relief in the State Court before filing suit in the Federal Court. The Supreme Court of Georgia held that the remedy was not available to appellant and expressly declined to intimate an opinion on what remedy, if any, was available to appellant. *Musgrove* v. *Georgia Railroad & Banking Co.*, 204 Ga. 139, 159.

6. *The long delay in obtaining an adjudication is causing irreparable injury to appellant.*

Appellant has vigorously, but so far unsuccessfully, sought since October 15, 1945, to obtain an adjudication of the issues either in the State or in the Federal Court. It is no closer to adjudication now than it was then. Meanwhile, if appellant ultimately loses, taxes at the rate of over a hundred thousand dollars per year are accruing, and interest at the rate of over $93,000 per year is accruing. Already, through 1949, over $1,600,000 has accrued if appellant is liable. Since the liability is in litigation, no income tax deduction is being allowed.

Justice so long delayed is justice denied.

STATEMENT OF FACTS

The charter of appellant, granted by the legislature of Georgia, provides that the capital of appellant shall be subject to tax only at the rate of one-half of 1 percent of the net return thereon (Ga. Laws, 1833, p. 256; Appellant's Brief, App. p. I). Both the Supreme Court of Georgia and this Court have held that that provision is an irrevocable contract which the State of Georgia may not impair under the Constitution of the United States. *Wright* v. *Georgia Railroad & Banking Co.*, 216 U. S. 420; *Wright* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 687; *State of Georgia* v. *Georgia Railroad & Banking Co.*, 54 Ga. 423.

Nevertheless, in 1945, the State of Georgia adopted an amendment to its Constitution attempting to revoke and nullify that provision (Appellant's Brief, App. p. XXIV).

On October 15, 1945, appellant brought an action in the Courts of Georgia for declaratory judgment and to enjoin the taxing authorities from imposing taxes contrary to that provision in the charter. The Supreme Court of Georgia held that the remedy attempted was not available to appellant and expressly declined to intimate an opinion on what remedy, if any, was available to appellant in the Courts of Georgia. *Musgrove* v. *Georgia Railroad & Banking Co.*, 204 Ga. 139.

Appellant then brought this action in the Federal Court to enforce the existing permanent injunction affirmed by this Court; or, in the alternative, as an independent action, to enjoin the State taxing authorities from attempting to assess and collect the taxes from appellant (R. 1-9).

The District Court held, on motion to dismiss, that the prior permanent injunction affirmed by this Court could not be enforced against the present State officials, and that the action could not proceed as an independent action to enjoin the State officials from collecting the tax because such suit was a suit against the State within the prohibition of the 11th Amendment, and dismissed the action (R. 170-181). One Judge dissented, saying that the prior judgment, affirmed by this Court, was conclusive and should be enforced by the Court that entered it (R. 180).

Appellant appealed directly to this Court. In argument here appellee contended, among other things, that the judgment of dismissal should be affirmed because appellant had a "plain, speedy and efficient" remedy in the Courts of Georgia within the meaning of the Johnson Act. The appellant contended, on the other hand, that it had no remedy whatever in the Courts of Georgia, or, if there was any remedy, it certainly was not "plain" within the meaning of the Johnson Act (Appellant's Brief, p. 31-38, Reply Brief, p. 5).

This Court, without considering or deciding whether there was any remedy in the Courts of Georgia, and if there was one, whether it was "plain", entered, on February 20, 1950, the following order:

> "Per Curiam: Inasmuch as the Attorney General of Georgia stated at the bar of this Court that plain, speedy and efficient state remedies were available to appellant, the cause is ordered continued for such period as will enable appellant with all convenient speed to assert such remedies."

The remedy stated by the Attorney General in oral argument to be available to appellant was by appeal to the Superior

Court from the assessment of the State Revenue Commissioner under the Act approved February 17, 1943 (Georgia Laws 1943, page 204; Appellant's Brief, App. p. XXXI). Appellant contended that the Georgia statute in the plainest possible language provides that such remedy is not available to appellant under the circumstances of this case, and that certainly such remedy is not "plain" within the meaning of the Johnson Act (Appellant's Brief, p. 37, Reply Brief p. 6).

Nevertheless, in obedience to the order of this Court, appellant promptly moved to have the injunction pending appeal modified so as to permit the assessment to be made. On May 26, 1950, appellee notified appellant of the proposed assessment. Within 30 days appellant filed protest as provided by Georgia law. Appellee set a hearing thereon July 12, 1950. Thereafter on September 21, 1950, appellee overruled the protest and made the assessment. Appellant promptly appealed to the Superior Court of Richmond County, Gorgia. In said proceeding appellee has now filed a plea alleging that the judgment of the District Court, on which this Court is withholding judgment on appeal at the request of appellee in order that the issues may be decided in the State Court, is res judicata in the State Court and concludes the issue. Said plea alleges:

> "Appellee denies paragraph 5 of the protest, as pleaded, and says that the judgment in the case of *Wright* v. *Georgia Railroad and Banking Company*, 216 U. S. 420, has since its rendition been held by the Supreme Court of Georgia as not res judicata against the State Revenue Commissioner of Georgia in the case of *Musgrove* v. *Georgia Railroad and Banking Company*, 204 Ga. 39 [sic], and has likewise been held not res judicata and not binding on this appellee by the District Court for the Northern District of Georgia in the case of *Georgia Railroad and Banking Company* v. *Redwine*, adjudicated July 9, 1949, a copy of which judgment by a majority of the Court is included in the transcript of record of the case of *Georgia Railroad and Banking Company* v. *Redwine*, pages 170 to

the end of said opinion on page 180, which by reference appellee attaches as his Exhibit "A"."

Paragraph 5 of appellant's protest, referred to in the above plea, alleges that the prior final judgment of the District Court, affirmed by this Court in *Wright* v. *Georgia Railroad & Banking Co.*, 216 U. S. 420, is res judicata and adjudicates that the taxes in question may not be collected. Pages 170-180 of appellee's Exhibit A referred to above is the opinion and judgment of the District Court now on appeal to this Court.

CONCLUSION

Wherefore, appellant moves the Court to terminate the continuance and decide the appeal.

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Before the undersigned, an officer authorized to administer oaths, personally appeared FURMAN SMITH, who, being sworn, says on oath that he is counsel for appellant in the above stated case and has personal knowledge of the facts stated in the foregoing motion to terminate the continuance and decide the appeal and that the facts stated in such motion are true.

FURMAN SMITH

Sworn to and subscribed before me this
20th day of November, 1950.

EUGENIA H. BROOK
Notary Public